

IN THE
**United States
Court of Appeals
FOR THE NINTH CIRCUIT**

JAMES JOSEPH CRAIN,
Appellant,

vs.

JOHN P. BOYD, District Director,
Immigration and Naturalization Service,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

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FILE

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JURISDICTION

The order of the District Court denying application for writ of habeas corpus was entered September 20, 1954. Jurisdiction of the District Court was had under Title 28, U.S.C. 2241 and of this court under Title 28, U.S.C. 1291 and 2253.

QUESTIONS PRESENTED

1. Whether Congress can provide for the deportation of a resident alien on grounds not made a condition at the time of entry?
2. Are deportation proceedings invalid:
 - a. By mere lapse of time when alien has made no showing of prejudice?
 - b. Because of the addition of an amended charge after the relevant evidence in support thereof has been introduced, all without a showing of prejudice?
 - c. Because a portion of the proceedings, were admittedly not conducted in accordance with the Administrative Procedures Act, even though the evidence introduced at earlier valid hearings was sufficient as a matter of law?
3. Was appellant prejudiced because the District Court erroneously refused to consider his request for declaratory relief?

STATEMENT OF THE CASE

Appellant entered the United States at New York in 1915 from Ireland and has remained in this country as an alien.

In 1938 he was arrested on a warrant in deportation proceedings, charging him with being a deportable alien in that he was a member of or affiliated

with an organization advocating the violent overthrow of the United States government. Deportation hearings were held in 1938 with no final action. In February 1948 the Commissioner of the Immigration and Naturalization Service ordered the reopening of hearings to bring the matter up to date.

Hearings were held during 1948 and 1949, and again in 1951. The 1951 hearing, on February 13, was held to consider an amended or additional charge lodged at that time, that appellant was deportable under the Internal Security Act of 1950 in that he had been a member of the Communist Party.

During the 1938 hearings, appellant had admitted that he was a member of the Party. Based upon this admission the Hearing Officer on June 19, 1951, found appellant to be deportable under the amended charge.

After consideration of appellant's exceptions the Assistant Commissioner ordered appellant's deportation, from which order appellant appealed to the Board of Immigration Appeals, said appeal being dismissed January 8, 1953.

Appellant petitioned the District Court for the Western District of Washington on February 4, 1953 for review of the deportation proceedings alleging the unconstitutionality of the Internal Security Act of

1950 and also violations of procedural due process in the manner in which the hearings were conducted.

District Judge William J. Lindberg, on April 8, 1953, entered findings and conclusions adverse to appellant's contentions. The order dismissing appellant's petition was deferred by stipulation so that appellant could apply for "discretionary relief." Upon denial of "discretionary relief," the order dismissing appellant's petition was entered September 20, 1954. It is from this order that appellant prosecutes this appeal.

The details on which appellant's alleged procedure defects are based, cover considerable ground and are discussed in detail as they are reached in the argument (*infra*).

SUMMARY OF ARGUMENT

That Congress may provide grounds for deportation of a resident alien which grounds were not conditions at the time of his entry into the United States is a conclusively settled proposition of law.

The delay in the conduct of the deportation proceedings was not considered below, and hence is not explained in the record. In any event mere delay unexplained with no showing of prejudice to appellant is not sufficient to invalidate a deportation pro-

ceeding.

Appellant's last contention, that he was not accorded due process of law because of the introduction of an amended charge without the subsequent taking of testimony is of no moment where the amendment cannot be shown to have prejudiced him and where sufficient testimony was theretofore in the record, having been taken in an earlier session of the deportation proceedings.

ARGUMENT

I. CONGRESS MAY IMPOSE NEW CONDITIONS FOR DEPORTATION SUBSEQUENT TO LAWFUL ENTRY.

In *Galvan v. Press*, 347 U.S. 522, the power of Congress to provide for the deportation of a legally resident alien because of his membership in the Communist Party, a ground enacted subsequent to entry, was upheld. See also *Jay v. Boyd*, 9th Circuit decided May 10, 1955, F. 2d

II. THE EFFECT OF DELAY IN THE INSTANT PROCEEDINGS WAS NOT PREJUDICIAL TO APPELLANT.

Appellant, without having pleaded facts in his petition supporting the claim, alleges now in his Brief to this Court that the delay in the administrative pro-

ceedings herein has not only severely prejudiced appellant but has resulted in illegality stemming from a defect in the warrant of arrest; it not being executed within a reasonable time. Plaintiff cites a number of cases in his brief on p. 34 to the effect that a long unexplained delay will invalidate a warrant of arrest and also other cases pertaining to delay in execution of a warrant of deportation.

In answer to this contention, it is important first to consider that the matter was not raised in the Court below, hence appellee was given no chance to explain or justify the apparent delay. The record in this Court also shows that no showing of prejudice to appellant was made in the District Court. It is apparent, however, from the course of the proceedings that the major part of the delay took place during the years of the second World War at a time when deportation was impossible, a fact of which this Court can take judicial notice. Also apparent from the course of the proceedings is the change in statutory basis for the deportation of one who is allegedly a member of the Communist Party. We also suggest to the Court that another factor in the delay was an attempt to comply with a 1950 decision requiring compliance with the Administrative Procedures Act. *Wong Yang Sung v. McGrath*, 339 U.S. 33. We are not here attempting to explain or justify the delay but are merely show-

ing that, had the matter been considered below that a showing could have been made.

Without considering the cases cited by appellant in detail it will suffice to note that in both *Petition of Popper*, 79 F. Supp. 530, and *U. S. v. Parson*, 22 F. Supp. 149, the question was the legality of residence in the United States by an alien, subject to an old order of deportation, for purposes in one case of naturalization; the other of denaturalization. The Court in *Popper* (*supra*) stated that the fact that an alien was subject to an order of deportation did not make her continued residence illegal. However the Court added language on which appellant here relies to the effect that a long lapse of time had occurred without the effecting of deportation, and that the government had at no time in the naturalization indicated a present desire to deport the alien and hence the Court was concluding that the government was no longer interested in the deportation order. The present proceeding is not a last minute urging of deportability to prevent naturalization but is a deportation proceeding itself.

The whole picture of delay in deportation matters has recently been considered by this circuit in *Spector v. Landon*, 209 F. 2d 481 (1953). On page 482 of that opinion the Court stated:

"No cases have been found by counsel holding that a deportation warrant becomes unenforceable through mere lapse of time, or for that matter because of dilatory conduct or laches on the part of the immigration authorities in effecting deportation."

and again on that page:

"It is not thought that dilatoriness or laches on the part of the authorities in the execution of the warrant would be regarded as of consequence unless the person affected is shown to have been prejudiced thereby. Obviously, the delay in effecting appellant's deportation operated to his advantage rather than the reverse * * * He has been permitted to remain in the United States, has been free to go where he would and to enjoy such material advantages as the country affords to its own citizens."

The fact remains, that, whether or not it was legally necessary to do so, in this case the delay could probably have been explained had appellant urged the matter below.

III. APPELLANT WAS NOT DENIED A HEARING ON THE CHARGES ON WHICH DEPORTATION WAS BASED.

It cannot be denied as appellant states on p. 36 of his Brief that an alien must be provided with procedural due process in deportation matters. The denial of due process urged by appellant in this case is basically explained as a contention that an addi-

tional or amended charge cannot be lodged in a deportation proceeding even though supported by the testimony previously taken. It is not denied by appellee that there was no repetition of the previous evidence supporting this charge after the amended charge was lodged. It is admitted, however, that prior admissions by appellant in the earlier proceedings fully support the amended charge, assuming the validity of that testimony both in regard to the conduct of the hearing at which it was given and its use in support of the amended charge.

It must first be pointed out that a deportation hearing is a civil action in nature. *Ex parte Shigenari Mayemura*, 53 F. 2d 621. And as such a latitude in amending charges to conform with the evidence should be allowed commensurate with that in the normal civil action.

In *Galvan v. Press*, 201 F. 2d 302, 347 U.S. 522, the opinion of this circuit below, shows that in a situation almost identical to the present case, that it is proper to amend or clarify the charges during the continuance of the administrative proceedings. It appears that the amendment in the instant case was done for the exact same purpose, i.e., to conform with the simplification of the Internal Security Act of 1950,

8 U.S.C., Sec. 137, which removed the requirement of proof of the nature of the Communist Party.

What then is the effect of a lack of evidence subsequent to the lodging of the amended charge? In the *Galvan* case *supra*, the appellant stipulated that the evidence taken previously could be received as evidence in the final hearing, and hence the Court did not seriously consider the question.

The final hearing in the instant case was stated to be a continuation of prior hearings, as such this proceeding should be considered exactly as any other civil case. Amendment of the pleadings to conform to the evidence is permitted under Rule 15(b) of the Federal Rules of Civil Procedure, in the discretion of the trial court. A judge's determination on the question of amendment will normally depend on the prejudice to the opposing party. In the instant case appellant was given opportunity, p. 403 of Exhibit A, to ask for additional time to prepare his defense to the amended charge and did not choose to do so. Again the matter of the validity of the amendment itself or any prejudice to appellant was not considered below since these matters were not raised by the petition.

There still remains for disposal the contention of appellant that because a portion of the hearings prior to the time of the case of *Wong Yang Sung*, 339 U.S.

33, were not conducted in accordance with the Administrative Procedures Act that there can be no evidence to support the amended charge.

It must be pointed out that the Administrative Procedures Act was enacted in 1946 therefore there can be no question of illegality in regard to the 1938 proceedings. It was on April 11, 1938, Exhibit A, p. 3, that appellant was asked: "Are you a member of the Communist Party?" to which he answered, "Yes," "How long have you been a member?" The answer — "about 6 months approximately." Further admissions at this hearing clearly supported the above admission. Appellant, of course, objects to the lack of compliance with the Administrative Procedures Act at the time of the 1948 hearings. However due to statutory changes subsequent to the 1948 hearings all the evidence therein introduced became immaterial and as a matter of law the evidence introduced at the 1938 hearing was sufficient to require appellant's deportation. *Galvan v. Press* (supra).

Appellant has no standing to argue a denial of a fair hearing because of noncompliance with the Administrative Procedures Act, because of the provision in Title 5, U.S.C., Section 1011 providing" . . . no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date

of such requirement." This provision was held to apply to deportation proceedings instituted prior to enactment in *Harisiades v. Shaughnessy*, 342 U.S. 580.

IV. REVIEW OF APPELLANT'S CASE BELOW BY WAY OF WRIT OF HABEAS CORPUS ONLY WAS NOT PREJUDICIAL ERROR.

It is conceded, as appellant asserts, that the district court denied his request for consideration of the deportation proceedings by way of an action for declaratory relief. It is further conceded that under the very recent Supreme Court case of *Shaughnessy v. Pedreiro* U.S., this position is technically in error. However, appellant has not shown how that error could have been prejudicial to him in the instant case where the substantive ground for deportation, i.e., membership in the Communist Party, was admitted and clearly complies with the Administrative Procedures Act requirement of substantial evidence. *Sumio Madokaro v. Del Guercio*, 9th Circuit, 160 F. 2d 164, cert. denied, 322 U.S. 764; *Marcello v. Aherns*, 219 F. 2d 830, aff'd U.S.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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